No. 85-1804

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THOMAS WEST,
Petitioner,

v.

CONRAIL, a foreign corporation;
BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES,
LOCAL 2906, a foreign corporation;
NEW JERSEY TRANSIT, a corporation of
the State of New Jersey;
and ANTHONY VINCENT,
Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

REPLY BRIEF FOR PETITIONER

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3740

Attorneys for Petitioner

February 1987

CASELLAS PRESS INC. - 1717 K ST NW WASHINGTON DC - 20036 • 223-1220

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Petitioner's opening brief argued that, in hybrid suits for breach of collective bargaining agreements and the duty of fair representation ("DFR"), the Court should apply the normal federal rule, based on Rule 3 of the Federal Rules of Civil Procedure, that a complaint stating a federal claim is timely if it is filed with the Court before the statute of limitations expires. The brief also explained that, by employing the portion of section 10(b) of the National Labor Relations Act ("NLRA") which also requires service

within the limitations period, the court below improperly wrenched that rule out of the context of National Labor Relations Board ("NLRB") procedures for which it was designed, and that, in the context of federal court litigation, the effect of the rule would be very different from its impact in NLRB practice. Finally, the brief acknowledged that, although this difference in impact could be lessened by importing into federal DFR litigation various other NLRB rules pertaining to timeliness, such a solution presents its own difficulties that ought to be avoided.

Different respondents accept and reject different aspects of petitioner's contentions. As a result, respondents have failed to establish a coherent rationale, other than the desire to cut back on DFR suits, for applying to DFR litigation the rule that NLRB unfair labor practice charges must be served on the charged party within six months of the unfair labor practice, as well as filed with the Board.

1. The Normal Rule Requires Only Filing to Satisfy the Statute of Limitations in Federal Question Cases.

Petitioner's opening brief demonstrated that, ever since Judge Learned Hand's opinion in *Bomar v. Keyes,* 162 F.2d 137, 140 (2d Cir. 1947), this Court and the lower courts have consistently assumed that, unless Congress has specified a different procedure for a particular federal cause of action, Rule 3 determines what a plaintiff must do in federal question cases in order to comply with a statute of limitations: *i.e.*, the plaintiff is required to "fil[e]" a "complaint" with the Court. Petitioner's Br. at 7-10, *citing Ragan v. Merchants Transfer,* 337 U.S. 530, 533 (1949); *Baldwin County Welcome Center v. Brown,* 466 U.S. 147, 149 (1984), and numerous lower court decisions.

Respondent employers nonetheless argue that there is no normal federal rule for federal question cases. New Jersey Transit Br. at 12; Conrail Br. at 9. They acknowledge that many lower court decisions treat Rule 3 as stating such a rule, but contend that those decisions are inconsistent with this Court's decision in *Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980). *Walker* was a diversity case in which the question was whether, by pursuing a state cause of action in federal court, a plaintiff could avoid a requirement of service within the limitation period that the state itself had placed on the state cause of action. The Court reasoned that it would be "inequitable" for the federal courts and state courts to apply different rules, because the federal court plaintiff could obtain an advantage over a state court plaintiff, "solely because of the fortuity that there is diversity of citizenship between the litigants." *Id.* at 753.

That analysis has no application here, however, because the hybrid DFR suit is a creature of federal common law. Thus, there is no danger of "inequitable administration," as there was in *Walker,* because a hybrid suit cannot be pursued differently in the federal courts and the NLRB. Indeed, the breach of contract half of the hybrid suit (*i.e.*, the section 301 claim against the employer) cannot be presented to the Board at all, *NLRB v. C & C Plywood Corp.,* 385 U.S. 421, 427 (1967), and this Court has yet to resolve the question whether the NLRB may enforce the DFR even against unions alone. *See Vaca v. Sipes,* 386 U.S. 171, 186 (1967). Accordingly, there is no danger that litigants could pursue a cause of action in federal court which had already been extinguished in the forum provided by the authority that created the cause of action, especially because the DFR remedy was not created by Congress or the NLRB, but was fashioned by this Court.

Respondent Conrail also invokes the legislative history of Federal Rules 3 and 4, citing excerpts which acknowledge a concern about whether those Rules could supersede statutes of limitations for *state* causes of action that require service within the limitations period. Conrail Br. at 10, 12. But the reason for that concern was that the Rules Enabling Act, 28 U.S.C. § 2072, forbids the enactment of rules that affect "any substantive right"; if the creator of a cause of action has determined that the substantive right should be limited to a certain period, including service within that time period, then a rule to the contrary might "abridge" the defendant's substantive right to timely notice. Thus, as Judge Hand stated in *Bomar v. Keyes,* the Rules would not excuse service outside the limitations period if such a requirement were "annexed as a condition to the very cause of action created." 162 F.2d at 140-141. Accordingly, although the drafters of Rules 3 and 4 recognized that the Rules would be construed so that "filing" and not "service" satisfied the statute of limitations, they were careful to warn against that result "if the law provides" otherwise. *See* excerpts quoted in Conrail Br. at 12.

In the hybrid suit, however, the creator of the cause of action – *i.e.,* this Court in *Steele v. Louisiana & Nashville RR,* 323 U.S. 192, 198-199 (1944); *Vaca v. Sipes, supra,* and similar cases – has made no express provision for any limitations period for the enforcement of that right, let alone for the time of service. Indeed, it is because of the lack of express direction on the limitations question that this Court had to grapple with the question twice, first in *UPS v. Mitchell,* 451 U.S. 56 (1981), and then in *DelCostello v. Teamsters,* 462 U.S. 151 (1983), before coming to the conclusion that it should borrow a statute of limitations for filing administrative complaints about unfair labor practices. Accordingly, there is no need to be

concerned about the Rules abridging substantive rights in DFR suits, *Sentry Corp. v. Harris,* 802 F.2d 229, 234 (7th Cir. 1986), and there is no reason not to continue to apply the traditional reading of the rules for federal causes of action.

Respondent union, unlike respondent employers, concedes that Rule 3 is the source of a normal federal rule that service is not required within the limitations period. Br. at 16. However, it would limit that rule to cases in which the statute of limitations uses magic words such as "brought" or "commenced." *Id.* at 16-18. But, according to the union, where the requirement of service is specifically included in the statute of limitations itself, that requirement must be borrowed as well. The union finds support for this argument by analyzing various decisions that applied the normal rule, showing that the borrowed statutes of limitations themselves used the magic words. The union concludes that the courts were free to disregard the service requirement only because it was in other state rules, rather than the statute of limitations, that the magic words were defined to require service as well as filing. *Id.* at 17 n.9.

But it can scarcely be a sensible rule that a borrowed limitations period will only require service within the stated period if the requirement appears within the same sentence or the same subparagraph of the state code. After all, if there is a state statute providing that actions are begun only when the defendants are served, a limitations statute that requires "commencement" within a given period will have been understood by its drafters to have incorporated the service requirement as well. Accordingly, although the union's argument purports to be more limited, its distinction is non-existent, or at least based on reasons that lack any substantial basis. At most, the "uniform" federal rule that filing the complaint with

the court satisfies the statute of limitations would apply only in the very unusual case in which Congress has specified a statute of limitations and that statute does not address the question of service. By eliminating a truly uniform rule, the union's analysis would unnecessarily increase the complexity of the procedures for litigating federal question cases in the federal courts, contrary to the objective of the Federal Rules.

Finally, all respondents assert that the application of Rule 3 would be inconsistent with several of this Court's decisions applying 42 U.S.C. § 1988, which requires the courts to apply the common or statutory law of the states in deciding civil rights claims unless those state rules are inconsistent with federal law. Accordingly, the Court has held that, unless federal interests at stake called for a different result, state rules governing the tolling of statutes of limitations should normally be borrowed along with the length of the limitations period to govern federal claims, including those under the civil rights laws. *E.g., Wilson v. Garcia,* 471 U.S. 261, 269 (1985); *Burnett v. Grattan*, 468 U.S. 42 (1984); *Board of Regents v. Tomanio,* 446 U.S. 478 (1980); *Johnson v. REA Express,* 421 U.S. 454 (1975).

But, as painstakingly explained in a recent Seventh Circuit decision, these decisions do not overturn the traditional application of Rule 3. *See generally Sentry Corp. v. Harris,* 802 F.2d 229, 235 *et seq.* (1986). The additional state rules that were to be borrowed all involved extra periods of time that might or might not delay the time within which the suit had to be "filed" or "commenced." *E.g., Wilson,* 471 U.S. at 270, n.21, *quoting Tomanio,* 446 U.S. at 488; *Johnson,* 421 U.S. at 461, 463; *Burnett,* 468 U.S. at 52 n.14 (*DelCostello* borrowed "the limitations period fixed by § 10(b) . . . for filing unfair labor practice

claims"). Thus, each of these cases called for the borrowing of state rules that determine how the length of time included in the limitations should be computed, not what the plaintiff must do in federal court in order to satisfy the statute of limitations in federal question cases.

Nor has the Court uniformly borrowed all state rules related to limitations periods. Indeed, although state rules governing the manner in which defendants must be served will often reflect judgments about the balance between the importance of the underlying claims and potential defendants' need for repose, this Court has not hesitated to hold that the Federal Rules govern the manner in which process must be served, even in diversity cases. *Hanna v. Plumer* 380 U.S. 460, 462-463 n.1 (1965). Thus, in federal question cases – and particularly in cases in which the federal cause of action was created, not by Congress, but rather by this Court as a matter of federal common law – the Court need not defer to section 10(b)'s provision for complying with the limitations period for administrative charges as if it represented, by analogy, a legislative judgment about how plaintiffs should be required to satisfy the statute of limitations in hybrid DFR suits. Instead, it should follow the normal rule, traditionally inferred by the federal courts from Rule 3, that filing the complaint with the Court satisfies the statute of limitations in federal question cases.

2. Application of the Normal Rule Would Permit the Enforcement of the DFR Without Harming the Interest in Labor-Management Stability That Underlay DelCostello.

Petitioner's opening brief argued that, because of the differences between administrative procedures and federal court litigation, the balance of interests served by section

10(b)'s requirement that administrative charges be served within the limitations period would be distorted if that requirement were borrowed for hybrid DFR litigation. Thus, on the one hand, it can be significantly more difficult for federal court DFR plaintiffs to effect service on defendants who may wish to be uncooperative than for charging parties to serve NLRB charges, while on the other, to allow service to be accomplished pursuant to the federal rules after the complaint is filed would not substantially burden the interests of defendants.

Respondents take issue with these arguments on both sides of the balance, arguing first that requiring service within the limitations period would not substantially burden the DFR plaintiff, and second that permitting service after satisfying the statute of limitations would seriously threaten their interest in repose. Before demonstrating that each of these contentions is incorrect, we must reply to respondent union's argument that, in making arguments based on the "substantial shortening of the time period within which DFR complaints must be filed, petitioner assumes an *a priori* answer to the very question that is in dispute here." Br. at 19. It is of course true, as the union observes, that adoption of one rule or the other will either have the effect of increasing or decreasing the effective time period within which suits must be filed; that observation undercuts not only petitioner's arguments about the effect of rule-selection on enforcement of DFR rights, but also respondents' counter-arguments about its effect on the policies of repose. *See infra* at 13-15.

But the question that must be resolved is, what timeliness rules should be used in order to best serve the various interests at stake in the hybrid suit? Are those policies best served by applying the service requirement to

hybrid litigation, or is the administrative context, in which a service requirement reflected a proper balancing, different enough from federal court litigation as to warrant a different rule about what is required within the six-month period? That inquiry does not, as the union argues, involve the Court in a "judicially [un]manageable task." Br. at 20. The Court need only focus on the differences in the two types of procedures, and their different effects on both sides of the balance, in deciding whether the balance adopted by Congress in section 10(b)'s service requirement should be employed in hybrid litigation.

Turning now to the burden on the employee plaintiff caused by the service requirement, respondents criticize petitioner's contention, Pet'r Br. at 19, that requiring service within six months gives DFR defendants a strong incentive to refuse or evade service. Respondents argue that employers and unions must maintain a public presence in order to do their jobs, and point to the fact that, in this case, all defendants returned acknowledgement forms under Rule 4(c)(2)(C). But the question is not what these respondents did here (possibly based on their confidence that the limitations period had already elapsed), but whether the Court should adopt a rule that will give all potential DFR defendants an incentive to make service difficult for DFR plaintiffs.

Although it is relatively simple to effect service on an employer, if necessary through the Secretary of State or the registered agent, unions are unincorporated associations that cannot be served in that manner. Moreover, although union agents must come to the workplace and to union meetings, process servers cannot walk into the premises to find them; moreover, many unions do not authorize their line officials or office employees to accept service

of process. *E.g.*, Teamsters 1986 Constitution, Article XXIV. Finally, those few officers who are authorized to accept service would have every reason to make themselves unavailable for service, for as long as possible, if delayed service meant expiration of the statute of limitations. Although there is less reason for concern about a potential defendant's ability to delay service for several weeks when the statute of limitations is measured in years, it can make a world of difference when only six months is allowed.[1]

Respondent union also suggests that, *if* the courts follow the NLRB's rule that service of the charge is effective upon mailing, whether or not the proper union or corporate official is present to accept service when the letter carrier arrives, then plaintiffs would be under no greater burden than a charging party before the NLRB. Br. at 19 n.13. However, the union argues elsewhere both that it is entitled to *receive* notice within the six months (which is not what the NLRB's rules provide), Br. at 13, and that it is unnecessary to decide that issue here because the issue is not squarely presented. Br. at 9 n.4. The employers join the union in arguing that they are entitled to receive notice within the six-month period, Conrail Br. at 12, New Jersey Transit Br. at 8, but differ in that they argue strenuously against the adoption of any of the NLRB timeliness rules except the service requirement.

Admittedly, adoption of the NLRB's mailing rule would lessen the force of petitioner's argument pertaining to the burden on DFR plaintiffs. However, despite that advantage, there are other, countervailing disadvantages described in our opening brief at pages 21 to 23, and the best solution is to follow the normal federal rule instead of plunging the courts into the details of NLRB practice. But more fundamentally, we cannot agree that the Court should defer decision on the extent of the adoption of the Board's timeliness rules under section 10(b). First, if the reason for borrowing the service requirement is that the Court has concluded that, in light of the NLRB's mailing regulation, the service rule will not unduly burden enforcement of the DFR, the Court should explain that this is the basis for its ruling. If, by contrast, the Court concludes that the Board's mailing regulation should not be borrowed, then there remains the problem that DFR plaintiffs may be unduly burdened. Second, if the service rule of section 10(b) is adopted here, the mailing issue, as well as the other incorporation issues under section 10(b), such as deference to other Board rulings in this area, will have to be litigated in the lower courts, and ultimately resolved by this Court. We urge the Court not to leave these issues dangling, but to resolve them so that the lower courts need not be consumed with still more procedural litigation about the time limits in DFR cases.

Furthermore, given the respondents' unanimous insistence that the service requirement be borrowed in order to ensure the implementation of Congress' balance between the policies of repose and the importance of the underlying rights, *supra* at 6-7, it is truly remarkable how insistent the respondent employers are that the other NLRB rules governing timeliness not be imported into the litigation of hybrid suits in federal court. Conrail Br. at 18; New Jersey Transit Br. at 16. Although such NLRB rules are as much a reflection of policy judgments about limitations periods and the notice function of a complaint

[1] Respondent union also suggests that, because defendants who refuse to acknowledge mailed service under Rule 4(c)(2)(C) may be assessed the costs of effecting alternate service, plaintiffs in hybrid cases are unlikely to encounter substantial service problems. Br. at 19-20, n.13. However, if a defendant concludes that, by refusing service, it can escape litigation on the merits, it will likely regard the extra few hundred dollars in service costs as a small price to pay.

as were the tolling issues in *Tomanio* and similar cases, respondents' reluctance to live with the logical consequence of their argument is understandable. After all, some of the Board's timeliness rules, such as the mailing rule, or the rule that a complaint about several employees' discharges relates back to a charge that mentions only one employee's discharge, Pet'r Br. at 22, reflect a balancing of policies that is distinctly less favorable to potential DFR defendants than the service requirement. However, there is no basis for picking and choosing among rules to be borrowed depending on whether they favor plaintiffs or defendants.

In order to avoid the borrowing of the Board's rules that are less favorable to its interests, New Jersey Transit argues that NLRB interpretations of the statute need not be borrowed along with the statute's express requirements, and that in any event it is the NLRB that must follow the courts, not the courts that must follow the Board. Br. at 16. But, when state limitation and tolling periods are borrowed, this Court has long considered itself bound by state court interpretations as well as by the explicit language of the state statutes. *E.g., Cope v. Anderson,* 331 U.S. 461, 466-468 (1947); *Barney v. Oelrichs,* 138 U.S. 529, 532-536 (1891). Moreover, although the courts do have the final word on whether interpretations of the NLRA are reasonable, they are bound to respect the discretion of the NLRB as it uses its unique expertise about the realities of labor relations and litigation to interpret that NLRA. *E.g., Pattern Makers League v. NLRB,* 473 U.S. 95 (1985). Finally, the courts have long approved many of the Board's timeliness rules, including its unusual rule about which claims relate back to the original charge. *See Radio Officers Union v. NLRB,* 347 U.S. 17, 34 n.30 (1954).

Under the reasoning of *Tomanio,* the federal courts

would have to first ascertain the Board's timeliness rules, and then apply their myriad details, and potential defendants would have to accept the unfavorable as well as the favorable parts of those rules. The only way to stop DFR litigation from beginning a slide down that slippery slope is to adopt petitioner's position, that what the Court borrowed in *DelCostello* was only the six-month period, and that the normal federal rule about what constitutes "commencement" of the federal action should apply to DFR suits such as this.

With respect to the burdens imposed on hybrid suit defendants by the application of the normal federal rule, respondents each assert that application of Rule 4(j) of the Federal Rules of Civil Procedure would permit defendants to be sued even though they did not receive service as late as four months after the statute of limitations expired (a total of ten months after the cause of action accrued). Respondents argue that unions and employers need to be able to rely on grievance settlements as establishing the law of the shop if they do not receive actual notice of a challenge within six months; to rule otherwise, they contend, would recreate the very uncertainty that the decision in *DelCostello* was designed to avoid. Union Br. at 13-14; Conrail Br. at 17; New Jersey Transit Br. at 6-7.

The fundamental flaw in this argument is that it falsely assumes that, under their proposal, potential DFR defendants will receive notice of suit six months after the relevant transaction occurs and that all their worries will then be over. But DFR defendants usually will not clearly recognize when the cause of action accrued, and thus when the six-month period began to run. Although in the case of most unfair labor practices, such as a discharge, it will be clear when the alleged violation took place, the violations in hybrid suits are by no means so neatly defined. The

claim in a hybrid suit does not accrue when the discharge takes place, but rather when "the grievance procedure was exhausted or broke down to the employee's disadvantage." *E.g., Proudfoot v. Seafarers,* 779 F.2d 1558, 1559 (11th Cir. 1986).

If a grievance was fully arbitrated to a decision, it is easy to pinpoint the starting date; but if it is a matter of the union failing to process a grievance, or proceeding with it in a half-hearted way, the statute only begins to run when a reasonable employee would have known that the union had abandoned his interests. *E.g., Scott v. Teamsters Local 863,* 725 F.2d 226, 229-231 (3d Cir. 1984); *Metz v. Tootsie Roll Industries,* 715 F.2d 299, 304 (7th Cir. 1983); *Santos v. Carpenters,* 619 F.2d 963, 969-973 (2d Cir. 1980). In this case, the grievance procedure dragged on for more than two years following petitioner's discharge — more than four times as long as the limitation period itself — before it "broke down to [West's] disadvantage." *Proudfoot, supra.* Moreover, the statute does not run while the employee is exhausting intra-union remedies, a process about which the employer may have no knowledge. *See Frandsen v. BRAC,* 782 F.2d 674 (7th Cir. 1986), where the exhaustion of intra-union remedies took eighteen months, or three times the limitation period itself. In these circumstances, it rings more than a little hollow for respondents to claim that industrial stability is threatened if the union or employer must wait a single day longer than six months after the claim accrued to receive a summons stating that a complaint has been timely filed against it.

Moreover, a discharged worker has every reason to seek to effect service as soon as possible, once he has hired a lawyer and filed suit, because only at that point can he

hope to obtain reinstatement and backpay as redress for his claimed violations of his rights. Thus, as a practical matter, the possibility that the delay in receipt of service could theoretically be as long as four months cannot justify a departure form the normal rule that filing the complaint with the court is sufficient to satisfy the statute of limitations. In sum, the balance of the interests and burdens in the context of the hybrid DFR action clearly favors adoption of the normal practice pursuant to Rule 3, not the additional service requirement for unfair labor practice charges under section 10(b).

CONCLUSION

The judgment of the Court of Apperals should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

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